No. 80-1639

APR 27 1981

# In the Supreme Court of the United States

**October Term, 1980**

GEORGE MILLER, SR., Individually and As Guardian of the Person and Estate of GEORGE MILLER, JR.,
*Petitioner,*

vs.

BOCK LAUNDRY MACHINE COMPANY,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

## BRIEF OF RESPONDENT IN OPPOSITION

RICHARD M. KERGER, *Counsel of Record*
MARSHALL, MELHORN, COLE, HUMMER & SPITZER
Fourteenth Floor
National Bank Building
Toledo, Ohio 43604
(419) 243-4200
*Attorney for Respondent*

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

## TABLE OF CONTENTS


I. STATEMENT OF THE CASE ..... 1

II. REASON FOR DENYING THE WRIT ..... 3

A. The Ohio Supreme Court Applied the Principles of the Full Faith and Credit Clause of the United States Constitution and 28 U.S.C. § 1738 in Enforcing the Judgment, and Accordingly No Substantial Federal Question Is Raised ..... 3

III. CONCLUSION ..... 5


## TABLE OF AUTHORITIES

### Cases


*Fauntleroy v. Lum*, 210 U.S. 230 (1908) ..... 4

*Titus v. Wallick*, 306 U.S. 282 (1939) ..... 4


### Constitutional Provisions and Statutes


U.S. Const., Art. IV, § 1 ..... 3

28 U.S.C. § 1738 ..... 3

No. 80-1639

# In the Supreme Court of the United States

**October Term, 1980**

GEORGE MILLER, SR., Individually and As Guardian of the Person and Estate of GEORGE MILLER, JR.,
*Petitioner,*

vs.

BOCK LAUNDRY MACHINE COMPANY,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

## BRIEF OF RESPONDENT IN OPPOSITION

### I. STATEMENT OF THE CASE

On September 1, 1975, George Miller, Jr., accompanied his mother to the Blue Ribbon Cleaning Center in Henderson, Texas. In the process of removing clothes from the extractor his arm was caught in the machine and severed. His father, George Miller, Sr., filed a products liability action in a Texas state court against Luther Jenkins d/b/a Blue Ribbon Cleaning Center ("Jenkins"), United Furniture Company ("United"), seller of the machine to Jenkins, and Bock Laundry Machine Company ("Bock"), an Ohio corporation and manufacturer of the machine in question.

Immediately before trial, Plaintiffs settled with Jenkins for $45,000. In exchange, the Millers agreed to hold Jenkins harmless from Bock's plea for indemnity or contribution.

The case came to trial before a jury of twelve against Bock, Jenkins and United. At no time during the trial was the jury told of the fact of the settlement between Jenkins and the Millers, or of the amount of the payment. Bock attempted to introduce evidence of the settlement, but this was not permitted.

A verdict was rendered against Bock in the amount of $250,000 for George Miller, Jr. and $1,000 for George Miller, Sr. for the medical expenses of his son.

Bock duly filed a Motion for Judgment *non obstante veredicto* on the ground that the evidence raised no issue of fact and that a directed verdict for Bock would have been proper. The trial court granted Bock's Motion. The Millers appealed to the Texas Court of Civil Appeals. This Court affirmed the lower court's decision.

They then appealed to the Supreme Court of Texas. On December 30, 1977, that Court reversed the decision of the two lower courts and ordered entry of judgment in accordance with the jury verdict.* Bock filed a Motion for Reconsideration. This Motion was denied and final judgment was entered in favor of the Millers. The judgment was recorded in the District Court of Rusk County on August 2, 1978.

The Millers commenced an action on August 10, 1978 in the Court of Common Pleas, Lucas County, Ohio. In opposing Plaintiffs' Motion for Summary Judgment, Bock asked that the $45,000 settlement paid by Jenkins be offset against the final judgment. The court rejected Bock's argument and granted summary judgment for the Millers for the full amount of the Texas judgment.

---

*Thus the amount of the settlement between the Millers and Jenkins was not offset against the final judgment as entered by the Supreme Court of Texas since the jury had determined the amount of its verdict without ever knowing about the settlement.

Bock appealed to the Court of Appeals. The sole issue on appeal was whether the $45,000 settlement paid by Jenkins should be offset against the judgment entered by the Supreme Court of Texas for $251,000, plus interest. The Court of Appeals affirmed the lower court's decision denying the set-off. A Notice of Appeal to the Supreme Court of Ohio was filed on January 12, 1980.

The Ohio Supreme Court issued its decision on December 30, 1980 holding that the Full Faith and Credit Clause and 28 U.S.C. § 1738 required Ohio courts to enforce the judgment as it would have been enforced in Texas. The Court then found that under Texas law, a set-off of an amount paid by other tortfeasors reduces the amount owed to the injured person by the others, whether or not liability on the part of that first tortfeasor was found. The Ohio Supreme Court found that the principles of *res judicata* did not bar the set-off inasmuch as the amount of the set-off had never been considered in the Texas courts.

## II. REASON FOR DENYING THE WRIT

### A. The Ohio Supreme Court Applied the Principles of the Full Faith and Credit Clause of the United States Constitution and 28 U.S.C. § 1738 in Enforcing the Judgment, and Accordingly No Substantial Federal Question Is Raised.

Article IV, Section 1 of the Constitution of the United States, provides that full faith and credit shall be given by each state to the judicial proceedings of every other state. Pursuant to this constitutional provision, Congress enacted 28 U.S.C. § 1738 which codifies Article IV, Section 1 of the Constitution, and further provides that a state's judicial proceeding shall have full faith and credit in every court as they have by law or usage in the court of such states

from which they are taken. The Supreme Court of the United States in interpreting these various provisions has stated:

> ". . . [T]hat the judgment of a state court should have the same credit, validity and effect in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none other, could be pleaded in any other court of the United States." *Fauntleroy v. Lum,* 210 U.S. 230 at 236 (1908).

What the Ohio Supreme Court held was that had the Millers sought to enforce the judgment in Texas, the request by Bock for set-off would have been granted. This is what the Constitution of the United States requires and since it is that which was done, there is no substantial federal question.

This is not a situation like *Titus v. Wallick,* 306 U.S. 282 (1939), in which the Ohio court was reversed by the Supreme Court for failing to enforce the judgment of a New York court because of the Ohio court's determination that due to the nature of the cause of action the plaintiff could not have maintained such a suit in Ohio. In *Titus,* the Supreme Court noted that it was the judgment, and not the cause of action which gave rise to it, that was the basis of the suit in Ohio and accordingly only matters relating to the judgment could be raised.

In this case, that is all that was raised—whether a set-off was allowable as of right in the state from which the judgment issued.

The petitioner makes brief allusion to the fact that the set-off was barred by the principles by *res judicata.* Inasmuch as evidence of the settlement and the amount of

the set-off were specifically precluded from the initial litigation in Texas, those principles do not bar their consideration in the Ohio enforcement attempts. More important, however, is the fact that a decision based on this issue of state law does not furnish a basis for review in this Court.

## III. CONCLUSION

The Ohio Supreme Court construed Texas law to allow a set-off, conducting this inquiry because of the requirements of the Full Faith and Credit Clause. The Ohio Supreme Court further found that *res judicata* did not preclude the set-off sought by the respondent. Neither of these decisions raises a substantial federal question, and for this reason the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD M. KERGER
MARSHALL, MELHORN, COLE,
HUMMER & SPITZER
1400 National Bank Building
Toledo, Ohio 43604
[419] 243-4200
*Attorney for Respondent*

Date: April 27, 1981